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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

WILLIAM DOWNS, Plaintiff and Appellant, v. RANDALL W. MERK, et al., Defendants and Respondents.	A139430 (San Francisco County Super. Ct. No. CGC-10-497353)

In this lawsuit alleging derivative shareholder and class action claims, plaintiff William Downs appeals the trial court's order granting the defendants' summary judgment motion. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Appellant was a shareholder in a mutual fund series of Schwab Investments (the Fund). In 2009, appellant sent the Fund a demand to remedy alleged breaches of fiduciary duty by its trustees and officers, the details of which are not relevant here. Schwab Investments' Board of Trustees (the Board) appointed a special committee comprised of independent trustees to investigate appellant's allegations. In November 2012, after conducting a lengthy investigation, the special committee issued a 101-page report recommending the Board reject appellant's demand. The Board agreed with the recommendation.

In June 2011—while the special committee was conducting its investigation but before it issued the report—the Board adopted a plan for liquidating and dissolving the Fund (the Liquidation Plan). As discussed further below, the parties vigorously dispute

whether the Fund was subsequently terminated. It is undisputed that in August 2011, a liquidation trust was created for the Fund (the Liquidation Trust). The Fund's assets were transferred to the Liquidation Trust to be liquidated and distributed to the Fund's shareholders.

Appellant sued various individuals and entities affiliated with Schwab Investments and/or the Fund (collectively, respondents).[1] He asserted a derivative shareholder claim based on the demand rejected by the Board. He also asserted a putative class action claim alleging conduct in violation of the Schwab Investments Declaration of Trust (Declaration of Trust). Appellant alleged respondents failed to comply with the Declaration of Trust by failing to monetize and distribute the value of appellant's derivative shareholder claim.

The trial court granted respondents' motion for summary judgment on both causes of action.

DISCUSSION

"A trial court ruling on a motion for summary judgment is subject to de novo review. [Citations.] Our review is limited to the facts shown in the affidavits supporting and opposing the motion and the uncontested factual allegations set forth in the pleadings. In this court, as in the trial court, the moving party's affidavits are strictly construed, and the opponent's affidavits are liberally construed. Due to the drastic nature of summary judgment, any doubts about the propriety of granting the motion must be resolved in favor of the party opposing the motion. [Citations.] While we review a summary judgment ruling under the same general principles applicable at the trial level, we must independently determine the construction and effect of the facts presented to the trial court as a matter of law." (*Kolodge v. Boyd* (2001) 88 Cal.App.4th 349, 355–356.)

[1] Although the various respondents have different roles, the differences are not relevant to our analysis. For convenience, we use the term "respondents" even when referring to only some of the respondents.

I. *Evidentiary Rulings*

Respondents made ten objections to evidence submitted by appellant in opposition to respondents' summary judgment motion. In its written ruling granting summary judgment, the trial court, without explanation, sustained nine of these objections and overruled the tenth. Appellant challenges these rulings.

As an initial matter, appellant notes our Supreme Court has not yet determined whether we review these rulings for abuse of discretion or de novo. (See *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 535 ["we need not decide generally whether a trial court's rulings on evidentiary objections based on papers alone in summary judgment proceedings are reviewed for abuse of discretion or reviewed de novo"]; but see *Miranda v. Bomel Construction Co., Inc.* (2010) 187 Cal.App.4th 1326, 1335 [" 'the weight of authority holds that an appellate court reviews a court's final rulings on evidentiary objections by applying an abuse of discretion standard' "].) We need not decide this issue as our conclusion would be the same even using de novo review.

Appellant contends the trial court erred in making a "blanket" ruling sustaining all but one of respondents' ten objections without explanation. Appellant relies on two cases reversing blanket rulings: *Twenty-Nine Palms Enterprises Corp. v. Bardos* (2012) 210 Cal.App.4th 1435, 1447–1448 (*Twenty-Nine Palms*), in which the trial court summarily sustained all of the plaintiff's 39 objections, several of which were unreasonable; and *Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 255–256, in which the trial court summarily sustained all but one of the defendants' 764 objections, many of which were frivolous and some of which failed to assert any basis for the objection. We find these cases easily distinguishable, as the number of objections summarily ruled upon here was much smaller and appellant has not shown any significant portion of the objections were unreasonable. In any event, as we review the trial court's rulings on evidentiary objections de novo and, as discussed below, either affirm the rulings or find any error harmless, appellant has failed to show prejudice from any error in the trial court's summary evidentiary ruling. (*Twenty-Nine Palms,* at p. 1449 ["an erroneous evidentiary ruling requires reversal only if 'there is a reasonable

probability that a result more favorable to the appealing party would have been reached in the absence of the error' "].)

Appellant also contends the trial court's ruling admitting evidence submitted by respondents on reply deprived him of his right to due process. Assuming, without deciding, the ruling was error, appellant has failed to demonstrate prejudice. (*Twenty-Nine Palms, supra,* 210 Cal.App.4th at p. 1449.) The only evidence submitted on reply that appellant argues was prejudicial is a Notice of Errata and its attachment, a Board resolution, which were filed by respondents in connection with a prior motion in this litigation. The Board resolution was submitted with respondents' opening summary judgment brief and was therefore not submitted for the first time on reply. The Notice of Errata was not evidence of any material fact at issue and was not relied upon by the trial court in its summary judgment ruling.[2]

We address appellant's additional arguments with respect to specific evidence below.

II. *Derivative Shareholder Claim*

The trial court found respondents made a prima facie showing of a complete defense to appellant's derivative shareholder claim. Specifically, the trial court held that under governing Massachusetts law a derivative claim must be dismissed if a majority of independent directors, after a reasonable inquiry and in good faith, decides maintenance of the claim is not in the best interests of the company. The trial court found respondents' evidence of the special committee's investigation and the subsequent Board decision to reject appellant's claim made a prima facie showing of these elements. On appeal, appellant argues disputed issues of fact exist regarding whether, prior to the Board's decision, the Fund had been terminated and/or the derivative claim had been

[2] Appellant contends the trial court took a statement in the Notice of Errata "as true." Although the trial court reached the same conclusion as the position taken in the Notice of Errata, it based its conclusion on the evidence in the record, not on the Notice of Errata itself.

transferred to the Liquidation Trust. Appellant contends that if either of these facts is true, the Board's action does not satisfy the affirmative defense.[3]

A. *Termination*

Like the trial court, we conclude the undisputed facts demonstrate the Fund did not terminate prior to the Board's decision. Pursuant to the Declaration of Trust, which all parties agree governs termination of the Fund, "Any series of Shares may be terminated at any time by vote of Shareholders holding at least a majority of the Shares of such series entitled to vote or by the Trustees by written notice to the Shareholders of such series." Appellant does not contend the Fund's shareholders voted to terminate the Fund. Instead, he contends written notice of the Fund's termination was provided in a Form 497 Prospectus Supplement the Fund filed with the Securities and Exchange Commission and provided to Fund shareholders in June 2011 (the Form 497). The Form 497 notified shareholders of the Board's decision to "close[] [the Fund] to new investors" and "liquidat[e]" the Fund. The notice does not use the word "terminate," nor does it use a clearly analogous word.[4] The plain language of the Declaration of Trust requires notice of termination be provided to shareholders to effect termination. The Form 497 notice, on its face, does not provide notice of termination.

Appellant points to the following deposition testimony of Joseph Wender, a member of the special committee investigating appellant's demand:

"Q. . . . Was the [F]und liquidated and dissolved?

"A. Yes.

"[Respondents' counsel]: Objection, vague, compound.

"Q. When did that occur?

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[3] Respondents contend they are entitled to summary judgment even if the Fund was terminated or the derivative claim transferred to the Liquidation Trust. As we will affirm the trial court's ruling on other grounds, we need not resolve this issue.

[4] "Liquidate" means "To ascertain and set out clearly the liabilities of (a company or firm) and to arrange the apportioning of the assets; to 'wind up'." (8 Oxford English Dict. (2d 3d. 1989) p. 1012.)

"A. August.

"Q. August of what year?

"A. 2011.

"Q. Would it be correct to say that the [F]und was terminated at that time?

"A. I think I answered that question. It was liquidated and dissolved."[5]

On summary judgment, respondents objected to this evidence as vague and compound (Objection No. 5). We agree the meaning of the words dissolve and terminate were unclear. Appellant contends the last quoted response indicates Wender equated "terminate" with "liquidate and dissolve." While his response could be construed as such, the response could also be construed to mean the opposite: to contrast his prior testimony that the Fund was liquidated and dissolved with the current question regarding termination. Moreover, immediately following the testimony quoted above, the following took place (with counsel's objections omitted):

"Q. I'm just trying to make sure that the terminology that I'm using and will be using in the deposition is correct. [¶] So would it also be correct to say that the [F]und ceased to exist at that time?

"A. The [F]und ceased to conduct business except as necessary in connection with the effectuation of its liquidation.

"Q. But the [F]und continued to have an existence?

". . .

"A. I don't quite know what you mean by that. What do you mean by 'Continue to have an existence?'

"Q. Well, I asked you if the [F]und ceased to exist and you said that it ceased to conduct business. [¶] Is there a difference between ceasing to conduct business and ceasing to exist?

". . .

[5] Wender later clarified his answers, stating the Fund "was liquidated, but my understanding now is that it was not dissolved."

"A. Yeah. The [F]und was liquidated and the continued operation was turned over to a liquidation trust."

This testimony suggests Wender did *not* equate dissolve with terminate. In any event, it underscores the uncertainty with respect to the witness's understanding of the relevant terms.

Appellant correctly notes respondents failed to object at the deposition to the following:

"Q. Would it be correct to say that the [F]und was terminated at that time?

"A. I think I answered that question. It was liquidated and dissolved."

This failure waived any objection. (Code Civ. Proc., § 2025.460, subd. (b).) However, Wender's testimony is not sufficient to create a disputed issue of fact. As noted above, it is not clear whether Wender equated "dissolve" with "terminate." In any event, Wender's understanding as to whether the Fund was terminated is irrelevant; the only material issue is whether the Form 497 notice constituted notice of termination under the Declaration of Trust. By its plain language, it did not.

Appellant next turns to the Liquidation Plan, which states its effective date is when the Board "provide[s] written notice to shareholders of the Fund of the Board's decision to dissolve and completely liquidate the Fund" and is "anticipated to be on or about June 22, 2011." The Liquidation Plan further provides the Fund shall liquidate "[a]fter" the Liquidation Plan's effective date. From this language, appellant concludes the Form 497 must have been the notice contemplated by the Liquidation Plan, i.e., notice of the decision to dissolve the Fund. We disagree. It may be that, under the terms of the Liquidation Plan, the shareholders *should have been* notified of the decision to dissolve the Fund, but that does not constitute evidence that they were in fact so notified.[6]

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[6] Appellant also points to the following testimony from Wender's deposition:

"Q. You knew that if that recommendation [in the Liquidation Plan] were followed, the Fund would be terminated before it was determined whether there would be any recovery on the derivative claims, correct?

"A. Correct."

Accordingly, we conclude the undisputed evidence shows the Fund was not terminated in June 2011 by the Form 497.

B. *Transfer*

We also conclude the undisputed facts show the derivative claim was not transferred to the Liquidation Trust.

After the Board adopted the Liquidation Plan, Schwab Investments entered into a Liquidation Trust Agreement with Charles Schwab Investment Management, Inc. (CSIM). Pursuant to the Liquidation Trust Agreement, CSIM serves as liquidation trustee and Schwab Investments "hereby grants, releases, assigns, transfers, conveys and delivers to the Liquidation Trustee all of the Fund's rights, titles and interests in and to all assets it currently owns, holds or in which it otherwise possesses any interest," to be held in trust for the Fund's shareholders. The parties vigorously dispute whether the derivative claim is an "asset" of the Fund under the terms of the Liquidation Trust Agreement.

Under governing Massachusetts law, "[a] contract must be read in a manner that will give effect to the chief design to be accomplished by it." (*Massachusetts Mun. Wholesale Elec. Co. v. Danvers* (Mass. 1991) 577 N.E.2d 283, 294 (*Massachusetts Mun. Wholesale*).) Courts "look primarily to the language of the contract in order to determine the parties' intentions." (*Ibid.*) The term "asset" is not defined in the Liquidation Trust Agreement. Respondents argue the derivative claim is not an asset but rather a "gain contingency." Appellant points to a definition of the term in the Declaration of Trust,[7]

The trial court properly sustained respondents' vagueness objection (Objection No. 6) because, as discussed above, the meaning of the word "terminate" was unclear. In any event, Wender's understanding of the Liquidation Plan is not relevant; the relevant question is whether notice of termination to Fund shareholders was in fact sent.

[7] The Declaration of Trust provides, "All consideration received by the Trust for the issue or sale of Shares of each series, together with all income, earnings, profits, and proceeds thereof, including any proceeds derived from the sale, exchange or liquidation thereof, and any funds or payments derived from any reinvestment of such proceeds in whatever form the same may be, . . . are herein referred to as 'assets of' such series."

but, even assuming this definition applies to the Liquidation Trust Agreement, it is not clear whether it encompasses a potential claim such as the derivative claim. Accordingly, the contractual language is ambiguous with respect to the derivative claim.

If contractual language is ambiguous, courts "may then consult extrinsic evidence." (*Browning-Ferris Indus., Inc. v. Casella Waste Mgmt. of Mass., Inc.* (Mass. App. Ct. 2011) 945 N.E.2d 964, 971.) Such evidence may include the parties' conduct after entering into the contract. Indeed, " '[t]here is no surer way to find out what parties meant [when they entered into a contract] than to see what they have done.' " (*Id.* at p. 972; see also *Massachusetts Mun. Wholesale*, *supra,* 577 N.E.2d at p. 295 ["[t]he conduct of the parties after the signing of the agreements is . . . indicative of their intent"].)

The evidence of the parties' conduct is not in conflict and demonstrates the parties did not intend to transfer the derivative claim. First, following the Liquidation Trust Agreement, the Board continued to expend substantial resources on the special committee's investigation into the derivative claim. If the Fund had transferred the derivative claim, there would be no reason for the Board to expend such resources. Therefore, this conduct strongly indicates an intent that the claim not be transferred by the Liquidation Trust Agreement. Second, in September 2011, the Board issued a resolution, "for the avoidance of doubt," recognizing the "continuing authority" of the Board and the special committee to investigate the pending derivative claims of the Fund.[8] There is no evidence the Liquidation Trust has ever asserted authority over or ownership of the derivative claim.

Appellant points again to Wender's deposition testimony. Appellant's counsel asked Wender whether the following statement was true: "Under the Liquidation Trust Agreement, all contingent assets of the Fund, including [appellant's] derivative claim, have been transferred to the Liquidation Trust." Wender responded, ". . . I know that the

[8] Appellant argues this resolution was enacted in response to an inquiry by his counsel. Even if true, this fact does not negate the resolution's impact as evidence of the parties' intent.

derivative claim was transferred to the Liquidation Trust." The question improperly sought Wender's testimony about the legal effect of the Liquidation Trust Agreement and respondents' objection on summary judgment (Objection No. 8) was properly sustained. (*Morrow v. Los Angeles Unified School Dist.* (2007) 149 Cal.App.4th 1424, 1444 [trial court properly excluded "improper lay opinion as to the meaning and legal effect of a contract"].) We note appellant does not contend Wender's testimony is evidence of the parties' intent at the time of the Liquidation Trust Agreement, and the question, on its face, does not seek such testimony.[9]

Accordingly, although the contract language is ambiguous, the extrinsic evidence as to the parties' intent is not in conflict and demonstrates the parties to the contract did not intend the derivative claim be transferred to the Liquidation Trust.

III. *Class Action*

Appellant's complaint alleged respondents breached the following provision of the Declaration of Trust: "Upon termination of . . . [a] series of Shares, . . . [Schwab Investments] shall, in accordance with such procedures as the Trustees consider appropriate, reduce the remaining assets to distributable form in cash or shares or other securities, or any combination thereof, and distribute the proceeds to the Shareholders of the series involved . . . ." Appellant contends respondents breached this provision by failing to distribute the value of his derivative claim to shareholders.

We agree with the trial court that appellant cannot establish damages.[10] The Board declined to pursue appellant's claim. Although appellant subsequently pursued it on behalf of the Fund, we are affirming the trial court's rejection of his derivative claim, as set forth above. Accordingly, unless appellant successfully appeals this decision, his

[9] Appellant also points to language in an earlier brief filed by respondents in the trial court stating the derivative claim was transferred to the Liquidation Trust. However, statements in briefs are not evidence (*In re Zeth S.* (2003) 31 Cal.4th 396, 414, fn. 7 ["It is axiomatic that the unsworn statements of counsel are not evidence"]), and appellant does not contend respondents are judicially estopped by that language.

[10] Because of this conclusion, we need not resolve the parties' remaining contentions with respect to this claim.

derivative claim cannot be pursued and therefore has no monetary value. As the claim has no value, appellant cannot prove damages from any failure to distribute its value. Contrary to appellant's contention, respondents were not obligated to present any other evidence to prevail on summary judgment on this cause of action. (*Guz v. Bechtel Nat. Inc.* (2000) 24 Cal.4th 317, 334 [summary judgment appropriate where "the defendant seeking summary judgment has conclusively negated a necessary element of the plaintiff's case"].)

DISPOSITION

The judgment is affirmed. Respondents shall recover their costs on appeal.

SIMONS, Acting P.J.

We concur.

NEEDHAM, J.

BRUINIERS, J.